

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD BRYAN SMITHHISLER

Claimant

VS.

LIFE CARE CENTERS AMERICA, INC.

Respondent

AND

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

Docket No. 1,014,349

ORDER

Claimant requested review of the April 12, 2006 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 7, 2006.

APPEARANCES

James R. Shetlar of Overland Park, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant was entitled to temporary total disability compensation for the time period from November 21, 2003, through April 30, 2004. Consequently, the calculation of the Administrative Law Judge's (ALJ) Award will be modified to reflect 23.14 weeks of temporary total disability compensation.

ISSUES

The respondent stipulated claimant suffered accidental injury to his left shoulder arising out of and in the course of his employment on October 15, 2003. The disputed issue was the nature and extent of disability. Specifically, whether claimant was entitled

to a permanent partial general body disability as a result of injuries to both his left shoulder and his neck, or was claimant limited to a scheduled disability to the left shoulder.

The ALJ found the claimant suffered a 15 percent permanent partial functional impairment to the left shoulder. The ALJ rejected claimant's allegations of an additional injury to his neck.

The issue raised on review by the claimant is the nature and extent of disability. The claimant asserts that he sustained a non-scheduled disability rather than the scheduled disability awarded by the ALJ. Claimant argues he also injured his neck in the work-related accident and should be compensated for a permanent partial general body impairment. Claimant further argues he is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating).

Conversely, respondent requests the Board to affirm the ALJ's Award. Respondent argues the opinions of the treating physicians that claimant's disability is limited to his left shoulder is more persuasive than the testimony of claimant's medical expert. Consequently, respondent requests the Board affirm the ALJ's finding that claimant's disability is limited to a 15 percent permanent partial scheduled disability to the left shoulder.

In the alternative, if it is determined claimant suffered a permanent partial general body impairment, the respondent argues claimant did not make a good faith effort to retain accommodated work with respondent as claimant was terminated for cause. Respondent also argues that claimant has returned to the same type of work for a subsequent employer and is earning wages equal to 90 percent or more of his pre-injury average gross weekly wage. Consequently, respondent further argues claimant should be limited to his functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was the maintenance director at respondent's nursing facility. His job duties included grounds keeping as well as building maintenance. On October 15, 2003, the claimant was lowering a 100-150 pound pump down into a pit when the pump slipped and the claimant grabbed it. His shoulder popped and immediately started hurting. Respondent referred the claimant for medical treatment with Dr. Charles Smith at Olathe Occupational Medicine.

The claimant was seen at Olathe Occupational Medicine on seven occasions from October 16, 2003 through November 20, 2003, and Dr. Smith testified that there was never

an assessment or a diagnosis of injury to any part of claimant's body other than his left shoulder.

Dr. Smith referred claimant for physical therapy to the left shoulder and AC joints but the doctor never referred claimant for physical therapy for his neck. An MRI of claimant's left shoulder was performed on November 18, 2003, and indicated a small partial articular sided rotator cuff tear.¹

Claimant was referred to Dr. Michael Mendlick, a board certified orthopedic surgeon. Dr. Mendlick first examined claimant on November 25, 2003, and at that office visit claimant only complained of left shoulder pain. Dr. Mendlick performed a physical examination of claimant, reviewed the MRI records and diagnosed claimant with a partial or complete rotator cuff tear on the left side.

On December 5, 2003, Dr. Mendlick performed a surgical open repair of a complete tear in claimant's left rotator cuff. The doctor described the procedure as drilling holes in the bone where the attachment of muscle goes and attaching the supraspinatus tendon back to the bone with heavy sutures. As the swelling and soreness in the shoulder improved the claimant was told to perform pendulum exercises on his own at home. Claimant was then referred for physical therapy.

At the February 26, 2004 office visit the claimant made his first complaint of neck pain to Dr. Mendlick. The doctor thought it was probably associated with the physical therapy for the shoulder and claimant would work through it so some physical therapy for the neck was added to his ongoing physical therapy for the shoulder. Dr. Mendlick saw claimant for follow up on March 25, 2004, and claimant still complained of moderate shoulder pain but noted his neck had gotten better with physical therapy.

On March 31, 2004, claimant was involved in a motor vehicle accident where his head either went through a passenger window or hit a fence outside where the vehicle came to rest. Claimant received stitches to the left side of his scalp but denied he hurt his neck in the accident.

On April 23, 2004, the claimant again saw Dr. Mendlick for a follow-up office visit. Claimant still had some complaints of left shoulder pain with certain motions but noted his strength was improving. The doctor noted claimant made no neck complaints at that time. The doctor told claimant that he would be released to return to work on April 30, 2004, with the admonition that it would be best to avoid overhead work if possible. A final follow-up visit was scheduled in six weeks.

¹ Smith Depo., Ex. 1.

On June 3, 2004, claimant returned to Dr. Mendlick for the final time. Claimant noted he had returned to work but was not doing overhead activities but he complained of some left shoulder pain with the inability to lift over his head. The doctor again noted claimant made no complaints of neck problems at that visit.

Dr. Mendlick never diagnosed the claimant with any type of neck condition and concluded he simply had muscular pain associated with the physical therapy for the shoulder. And that condition was resolved by the physical therapy. The doctor explained:

Q. Did you see any need - - well, I guess, let me back up. If a patient comes to your office, Doctor, with complaints of neck pain as we've had in this case, with the related shoulder injury, maybe I shouldn't use the word "related," but with the shoulder injury that he has had, what is your general plan of action, how are you going to attack with a plan like that?

A. Well, just about like I did. You know, if you come in with a primary complaint of neck pain and, you know, I'm going to look at your neck more, buy my estimation of this is this came on during a period of time when there wasn't any trauma or anything else going on except rehab, and so I wouldn't expect anything more than muscular pain.

Q. If the patient had not shown any improvement in physical therapy, what course of action would you have taken?

A. Cervical spine x-rays first and then depending on what you find on those you might do an MRI but might not, I mean, it depends on what you find.

Q. All right. And we will go over the remainder of your notes here in a little bit. Did you ever recommend any sort of radiological testing or diagnostic testing for his neck?

A. I don't believe I did.

Q. Why was that?

A. Because I wasn't very concerned about it being a serious problem. I thought it was more related to his rotator cuff recovery.²

Based upon the AMA *Guides*³, Dr. Mendlick opined the claimant suffered a 5 percent permanent partial impairment to the left upper extremity at the shoulder based upon the loss of range of motion.

² Mendlick Depo., at 22-23.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant saw Dr. Pedro A. Murati on December 8, 2004, at his counsel's request. Dr. Murati performed a physical examination of claimant and noted he had full range of motion of the cervical spine. The doctor diagnosed claimant with left shoulder pain status post acromioplasty and rotator cuff reconstruction and myofascial pain syndrome affecting the cervical spine. The doctor opined claimant suffered a 10 percent left upper extremity impairment for the left shoulder post subacromial decompression with an additional 8 percent left upper extremity impairment for AC crepitus which combine for a 17 percent left upper extremity impairment. For the myofascial pain syndrome affecting the cervical paraspinals, the doctor opined claimant suffered a 5 percent whole person functional impairment. The doctor then combined the impairments for a 15 percent whole person impairment.

Claimant testified he is still having problems with his left shoulder, neck and upper back. He further testified he had not had any previous problems with his shoulder but he had some with regard to his neck and back. Claimant was treated by Dr. Wilson, a chiropractor, for his previous neck and back problems.

Claimant worked for Standard Heating & Cooling from May 3, 2004 through August 2004 and then for Thermal Craft. He testified the job he is currently performing exceeds Dr. Murati's restrictions. Claimant is currently earning more per hour than he did working for respondent.

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.⁴ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁵

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

The claimant complained of and received medical treatment for his left shoulder pain. During physical therapy prescribed for his left shoulder symptoms there was some therapy addressed to the neck but Dr. Mendlick noted that was common during recovery from the rotator cuff surgery claimant had undergone. The significant fact is that after Dr. Mendlick recommended some physical therapy to address claimant's neck complaints, the problem improved and claimant did not again complain of neck problems to Dr. Mendlick.

⁴ K.S.A. 44-510d; K.S.A. 44-510e.

⁵ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

And that is true even though claimant was in a motor vehicle accident where his head either went through a passenger window or struck a fence outside the window.

The ALJ concluded claimant's neck complaints were not adequately supported in the records and were insufficient to support a finding he suffered a permanent partial general body impairment. The Board agrees that in this case the injury was to the claimant's left shoulder and although he experienced temporary neck pain during physical therapy for the shoulder, that condition improved as evidenced by the fact that he made no further complaints of neck problems to his treating physician. In that respect the Board finds the opinion of Dr. Mendlick more persuasive than Dr. Murati.

The ratings for the claimant's left upper extremity impairment at the shoulder ranged from Dr. Mendlick's 5 percent to Dr. Murati's 17 percent. The claimant's percentage of impairment lies somewhere in that range. The ALJ determined Dr. Murati's opinion regarding the shoulder was more persuasive than Dr. Mendlick's and accordingly awarded claimant a 15 percent permanent partial scheduled disability to the left shoulder. The respondent requested the Board affirm that finding. However, as previously noted, Dr. Murati's rating for claimant's left upper extremity was 17 percent and his rating for the whole body was 15 percent. It appears the ALJ mistakenly adopted Dr. Murati's whole person rating instead of the 17 percent rating for the shoulder. Upon review of the entire evidentiary record, the Board agrees with the ALJ's determination that in this case Dr. Murati's rating for the shoulder is more persuasive. And because that rating is 17 percent, the ALJ's decision is modified to find claimant is entitled to compensation for a 17 percent permanent partial scheduled disability to the left shoulder.

Finally, it should be noted that at regular hearing the parties stipulated that claimant's average gross weekly wage was \$943.72. As that stipulation was never withdrawn the Board likewise affirms the ALJ's determination that claimant's average weekly wage was \$943.72.

As previously mentioned, pursuant to the parties' agreement at oral argument, the award will be modified to reflect claimant is entitled to temporary total disability compensation for 23.14 weeks.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated April 12, 2006, is modified to reflect claimant is entitled to 23.14 weeks of temporary total disability compensation and permanent partial disability compensation for a 17 percent scheduled disability to the left shoulder.

The claimant is entitled to 23.14 weeks of temporary total disability compensation at the rate of \$440 per week in the amount of \$10,181.60 followed by 34.32 weeks of permanent partial disability compensation, at the rate of \$440 per week, in the amount of

\$15,100.80 for a 17 percent loss of use of the left shoulder, making a total award of \$25,282.40.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge